

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

COGNITIM, INC., a California
corporation,

Plaintiff,

v.

OBUYASHI CORPORATION, a Japanese
corporation; TOSHINORI IWAMOTO;
SAVIO FERNANDES,

Defendants.

No. C-05-3747 SC

ORDER DENYING IN PART
AND GRANTING IN PART
DEFENDANTS' MOTION TO
DISMISS

I. INTRODUCTION

Cognitim, Inc. ("Plaintiff" or "Cognitim") brought this action in the Superior Court for the County of San Francisco, California against the Obayashi Corporation ("Obayashi"), Toshinori Iwamoto ("Iwamoto"), and Savio Fernandes ("Fernandes"), (collectively "Defendants"), alleging, inter alia, fraud and interference with economic expectation. Plaintiff's Complaint at 3-8 ("Compl.").

Presently before the Court is Defendants' motion to dismiss Plaintiff's six causes of action pursuant to Federal Rule of Civil Procedure ("FRCP") 12(b)(6) or to order Plaintiff to file a more definite statement under FRCP 12(e). Defendants' Memorandum in Support of Motion to Dismiss at 6 ("Defs.' Mem."). The Court,

1 having reviewed the parties' submissions, hereby DENIES
2 Defendants' motion to dismiss Plaintiff's first, second, third,
3 and sixth claims. The Court GRANTS Defendant's motion as to
4 Plaintiff's fourth and fifth claims. The Court DISMISSES
5 Plaintiff's fourth and fifth claims and GRANTS Plaintiff thirty
6 days' leave to amend its Complaint as to its fourth and fifth
7 claims.

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9 **II. BACKGROUND**

10 The following allegations are taken from Plaintiff's
11 Complaint and will be assumed as true for purposes of the present
12 motion.

13 Obayashi contracted with Plaintiff, a computer technical
14 support firm, to perform computer networking tasks.¹ Compl. at 2,
15 3. Plaintiff assigned its employee, Fernandes, to perform these
16 tasks for Obayashi. Id. While there, Fernandes "habitually and
17 systematically under-reported" to Cognitim the hours he worked at
18 Obayashi. Id.

19 Iwamoto, an employee of Obayashi, told Vipin Suneja
20 ("Suneja"), president of Cognitim, that Obayashi wanted to hire
21 Fernandes. Id. Suneja agreed, provided that Obayashi would pay
22 the conversion fee for taking Fernandes.² Id. Iwamoto said that

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24 ¹ Neither party has stated what sort of business Obayashi
engages in.

25 ² A conversion fee is, apparently, a courtesy amount one
26 business pays to another in order to compensate the other company
for the costs it paid to obtain the services of a non-U.S. citizen
27 employee. Compl. at 2.

28 Fernandes is a citizen of India. Id. at 1. Cognitim

Obayashi did not want to pay the conversion fee and that it would not hire Fernandes directly. Id.

DirectApps, an entity not a party to this action, wanted to hire Cognitim but wanted to interview Fernandes, as the primary Cognitim employee on the proposed project, before agreeing to hire Cognitim. Compl. at 2-3. After the interview, DirectApps told Obayashi that it would not hire Cognitim. Id. at 3. A week after that, Fernandes quit his job at Cognitim and told Suneja that he was taking a job in Dallas. Id. The following week, Suneja learned that Fernandes had "bombed the interview" with DirectApps causing DirectApps not to hire Cognitim. Id. Some time after this, Cognitim learned that Fernandes had taken a position with Obayashi. Id.

Plaintiff brought an action in the Superior Court for the County of San Francisco, California alleging that Defendants (1) committed fraud, (2) conspired to commit fraud, (3) breached the implied covenant of good faith and fair dealing, (4) intentionally interfered with a prospective economic advantage, (5) negligently interfered with a prospective economic advantage, and (6) breached an implied contract. Id. at 3-8. Defendants timely removed the action to Federal Court, alleging that complete diversity existed between Plaintiff and Defendants. Notice of Removal at 1-2.

In the present motion, Defendants contend that the six claims

sponsored Fernandes for purposes of obtaining a H-1B visa for him, posted the bond for his visa, and paid for his relocation fees. Id. at 2.

1 should be dismissed under FRCP 12(b)(6). Defs.' Mem. at 6. In
2 the alternative, Defendants move the Court to order Plaintiff to
3 file a more definite statement under FRCP 12(e) because the
4 "claims are confusingly written and fail to identify which
5 defendant is the target of which claim." Id. at 2.

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7 **III. LEGAL STANDARD**

8 "[A] complaint should not be dismissed for failure to state a
9 claim unless it appears beyond doubt that the plaintiff can prove
10 no set of facts in support of his claim which would entitle him to
11 relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957). "In
12 reviewing a 12(b)(6) motion, this Court must accept the factual
13 allegations of the complaint as true and must draw all reasonable
14 inferences in favor of the plaintiff." Bernheim v. Litt, 79 F.3d
15 318, 321 (2d Cir. 1996); see also Usher v. City of Los Angeles,
16 828 F.2d 556, 561 (9th Cir. 1987). The complaint need not set out
17 the facts in detail; what is required is a "short and plain
18 statement of the claim showing that the pleader is entitled to
19 relief." FRCP 8(a); see also La Salvia v. United Dairymen, 804
20 F.2d 1113, 1116 (9th Cir. 1986). Thus, the Court's task "is
21 merely to assess the legal feasibility of the complaint, not to
22 assay the weight of the evidence which might be offered in support
23 thereof." Cooper v. Parsky, 140 F.3d 433, 440 (2d Cir. 1998).

24 In diversity cases, state law determines whether claims exist
25 and what defenses are recognized. See Taylor v. United States,
26 821 F.2d 1428, 1433 (9th Cir. 1987). The Federal Rules, however,
27 govern the manner in which these claims and defenses are raised.

1 5 Wright & Miller, Federal Practice and Procedure, § 1204.

2 The Federal Rules provide for notice pleading. See Conley v.
3 Gibson, 355 U.S. 41, 47-48 (1957). This means that (a) the
4 pleadings need not set out in detail the alleged facts
5 constituting the claim for relief or defense, unless heightened
6 pleading standards are required and (b) the pleadings need give,
7 through a short and plain statement, only fair notice of the
8 pleader's claim or defense so that opposing parties can respond,
9 undertake discovery, and prepare for trial. Id.

10
11 **IV. DISCUSSION**

12 A. First Claim: Fraud

13 Defendants contend that Plaintiff has failed to meet the
14 heightened pleading requirements for fraud under FRCP 9(b).
15 Defs.' Mem. at 7.

16 Plaintiff alleges that Fernandez "under-reported" to Cognitim
17 the hours he worked at Obayashi. Compl. at 2.

18 In all averments of fraud or mistake the circumstances
19 constituting fraud or mistake shall be stated "with
20 particularity." FRCP 9(b). Plaintiffs must put forth the "who,
21 what, where, and when of the alleged fraud" in order to "assure
22 that the charge of fraud is responsible and supported, rather than
23 defamatory and extortionate." Ackerman v. Northwestern Mutual
24 Life Insurance Company, 172 F.3d 467, 469 (7th Cir. 1999). FRCP
25 9(b)'s particularity requirement is in place so that the
26 "defendant can prepare an adequate answer from the allegations,"
27 Moore v. Kayport Package Express, Inc., 885 F.2d 531, 540 (9th

1 Cir. 1989), and "not just deny that they have done anything
2 wrong." Semegen v. Weidner, 780 F.2d 727, 731 (9th Cir. 1985).

3 Fraud, under California law, consists of the following
4 elements: (1) misrepresentation; (2) scienter; (3) intent to
5 induce reliance; (4) justifiable reliance on the
6 misrepresentation; and (5) damage caused by reliance on the
7 misrepresentation. Witkin, Summary of California Law (10th ed.
8 2005), Volume 5, Torts, § 772.

9 The Court finds that the Plaintiff has put forth with
10 particularity a set of facts sufficient to state a claim of fraud.
11 Specifically, Plaintiff has stated that Fernandes, during the time
12 he worked for Obayashi and at Obayashi's behest, under-reported to
13 Plaintiff the hours he worked, so that Obayashi could pay
14 Plaintiff less than it should have. Compl. at 2. This pleading
15 gives Defendants fair notice of the nature of the claim.

16 The Court denies Defendants' motion to dismiss the first
17 claim.

18 The following section discusses Defendants' contention that
19 Plaintiff's first claim does not make it clear against whom the
20 allegations are directed.

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22 B. Second Claim: Conspiracy to Defraud

23 Defendants contend that there is no cause of action for
24 conspiracy to defraud under California law. Defs.' Mem. at 9.
25 Defendants also contend that Plaintiff's second claim simply
26 duplicates the first claim. Id.

27 Defendants are right and wrong. "[T]here is no civil action
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1 for conspiracy to commit a recognized tort unless the wrongful act
2 itself is committed and damage results from that act." Witkin,
3 Summary of California Law (10th ed. 2005), Volume 5, Torts, § 45.
4 "Hence, where the complaint charges a conspiracy and the
5 commission of a wrongful act, the only significance of the
6 conspiracy charge is that each member may be held responsible as a
7 joint tortfeasor, regardless of whether that member directly
8 participated in the act." Id.

9 The Court finds that Plaintiff has properly pled a charge of
10 conspiracy. Specifically, Plaintiff has alleged, in his first
11 claim, a claim of fraud. Then, by bringing a charge of
12 conspiracy, Plaintiff claims that each defendant should be held
13 responsible as joint tortfeasors for the fraud. This pleading
14 gives Defendants fair notice of the nature of the claim.

15 The Court therefore denies Defendants' motion to dismiss
16 Plaintiff's second claim.

17
18 C. Third Claim: Breach of Implied Covenant of Good Faith
and Fair Dealing

19 Defendants contend that Plaintiff has failed to "allege or
20 identify any contract language or operative transactional facts
21 from which the Court can infer an implied covenant." Defs.' Mem.
22 at 10. More specifically, Defendant asserts that when parties
23 rely on a written contract, the exact terms of that contract must
24 be given in order to demonstrate a breach of the covenant. Id.

25 Plaintiff contends that Fernandes breached the covenant by
26 falsely representing his continued employment with Cognitim and
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1 that Obayashi breached the covenant by misrepresenting its
2 intentions in regard to Cognitim and Fernandes. Compl. at 5-6.

3 Defendants' contentions are without merit. First, Plaintiff
4 does not contend that there were written contracts. Under
5 California law, contracts can be express or implied, the
6 difference between the two being only the manifestation of assent.
7 See Witkin, Summary of California Law (10th ed. 2005), Volume 1,
8 Contracts, § 102.

9 The Court finds that Plaintiff has adequately pled a set of
10 facts to support a claim for breach of the covenant of good faith
11 and fair dealing by declaring that Fernandes and Obayashi breached
12 contracts each had with Plaintiff. This pleading gives Defendants
13 fair notice of the nature of the claim.

14 As to Plaintiff's third claim, the Court denies Defendants'
15 motion to dismiss.

16
17 D. Fourth Claim: Intentional Interference with Prospective
18 Economic Advantage

19 Plaintiff contends that despite Obayashi's assurances, it
20 intended to have Fernandes work for Obayashi immediately, without
21 the payment of the conversion fee. Compl. at 6. As part of this
22 conspiracy, Plaintiff contends, Fernandes "sabotaged his interview
23 with DirectApps" which caused DirectApps not to hire Cognitim for
24 the networking contract, even though DirectApps "was already an
25 existing client of Cognitim." Id. Plaintiff also alleges that as
26 part of this interference "defendants falsely represented to
27 Cognitim that Cognitim's services were no longer needed and that
28

1 Fernandes was quitting to go to work for another firm in Dallas,
2 Texas." Id.

3 Defendants contend that Plaintiff's "theory makes no sense,
4 because even if Mr. Fernandes did well at the interview, there was
5 nothing to stop Mr. Fernandes from quitting and going to work for
6 Obayashi." Defs.' Mem. at 11.

7 One element of the tort is "[c]onduct that was wrongful by
8 some legal measure other than the fact of the interference
9 itself."³ Witkin, Summary of California Law (10th ed. 2005),
10 Volume 5, Torts, § 742. Examples of these wrongful acts are
11 bribery or offering sexual favors. Id. at § 744.

12 Plaintiff has not alleged to the Court's satisfaction any
13 facts demonstrating that Defendants' interference was in itself
14 wrongful by some legal measure other than the fact of the
15 interference itself.⁴ Without alleging such facts, it is not
16 legally feasible for the Plaintiff to bring this claim.

17 The Court grants Defendants' motion as to the fourth claim.
18 The Court therefore dismisses the fourth claim and grants
19 Plaintiff thirty days' leave to amend its Complaint as to this
20 claim.

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22 ³ The other elements are (a) an economic relationship between
23 the plaintiff and some third party, with the probability of future
24 economic benefit to the plaintiff; (b) the defendant's knowledge of
25 the relationship; (c) intentional acts by the defendant designed to
26 disrupt the relationship; (d) actual disruption of the
27 relationship; and (e) economic harm to the plaintiff proximately
28 caused the acts of the defendant. Witkin, Summary of California
Law (10th ed. 2005), Volume 5, Torts § 742.

⁴ Plaintiff has not demonstrated to the Court's satisfaction
that the failure to pay the conversion fee is a legally wrongful
act.

1 E. Fifth Claim: Negligent Interference with Prospective
2 Economic Advantage

3 Plaintiff puts forth the same allegations in his fifth claim
4 as he put forth in his fourth claim. Compl. at 7.

5 As with the former tort, a plaintiff must plead and prove
6 that defendant's conduct, other than the interference itself, was
7 wrongful. Witkin, Summary of California Law (10th ed. 2005),
8 Volume 5, Torts, § 742.

9 Plaintiff has not alleged to the Court's satisfaction any
10 facts that Defendants' interference was wrongful in some legal
11 measure other than the fact of the interference itself.⁵ Without
12 such allegations of fact, it is not legally feasible for the
13 Plaintiff to bring this claim.

14 The Court grants Defendants' motion as to the fifth claim.
15 The Court therefore dismisses the fifth claim and grants Plaintiff
16 thirty days' leave to amend its Complaint as to this claim.

17 F. Sixth Claim: Breach of Implied Contract

18 Plaintiff contends that Fernandes, by quitting his job at
19 Cognitim and accepting a position at Obayashi, breached his
20 implied contract with Cognitim, which required him to work for
21 Plaintiff long enough to compensate it for paying for his visa.
22 Compl. at 7-8.

23 Defendants contend that Plaintiff "already alleged [that]
24 these terms were the subject of an express contract" as stated in
25

26 ⁵ Plaintiff has not demonstrated to the Court's satisfaction
27 that the failure to pay the conversion fee is a legally sufficient
28 wrongful act.

Paragraph 6 of Plaintiff's Complaint. Defs.' Mem. at 15-16. Specifically, Defendants contend that because an express contract and an implied contract - both embracing the same subject matter at the same time - cannot exist, this claim should be dismissed. Id. at 16.

Paragraph 6 states that Fernandes "agreed to work for Cognitim for a sufficient period of time to allow Cognitim to recoup its costs of sponsoring Fernandes for [the] visa." Compl. at 2.

The Court does not agree with Defendants' contentions. A party, subject to the requirements of Rule 11, may set forth inconsistent theories and inconsistent factual allegations. See FRCP 8(e)(2); Henry v. Daytop Village, Inc., 42 F.3d 89, 95 (2d Cir. 1994).

The Court therefore denies Defendants' motion to dismiss Plaintiff's sixth claim.

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